Supreme Court, U.S.
FILED

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NO.

IN THE

Supreme Court of the United States

WEST VIRGINIA, ex rel.,
WINCHESTER MEDICAL CENTER,
Petitioner,

v.

HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Berkeley County,
West Virginia

MICHELLE R. PEVARNIK and

DARREN PEVARNIK,
Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In this case based upon the medical treatment of one patient that took place only at Winchester Medical Center in Winchester, Virginia, are traditional due process notions of fair play and substantial justice offended by West Virginia's exercise of jurisdiction over Winchester Medical Center on the grounds that it provides medical care to West Virginians; conducts collection actions against West Virginians in West Virginia for medical treatment they received in Virginia; allows independent physicians to practice at Winchester Medical Center who also happen to practice in West Virginia; and has telephone book listings in a limited number of West Virginia telephone books?

II. Does a hospital's compliance with the mandatory provisions of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (requiring a hospital to provide a medical screening examination to any patient requesting it), and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692i(a)(2) (which mandates that a collection action may be brought only where a contract is made or the debtor resides), constitute purposeful availment of the rights and privileges of a foreign state sufficient to vest that state with general jurisdiction over the hospital?

PARTIES TO THE PROCEEDING

Petitioner is Winchester Medical Center, a hospital located in Winchester, Virginia, and represented by Charles F. Hilton of Wharton, Aldhizer and Weaver, PLC, 100 South Mason Street, P.O. Box 20028, Harrisonburg, Virginia 22801-7528. Winchester Medical Center, Inc., is incorporated in the Commonwealth of Virginia and is a subsidiary of Winchester Regional Health System, Inc., under the fictitious name Valley Health System, Inc.

Respondents are the Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, West Virginia; and Michelle R. Pevarnik and Darren Pevarnik, represented by Terrance L. Britt and Bradley J. Reed of the Britt-Getty Law Offices, 1509 Charles Town Road, Post Office Box 1800, Martinsburg, West Virginia, 25402.[1]

Other parties to the proceedings below who have no interest in the outcome of the petition are Trumer J. Wagner, M.D., represented by Dino S. Colombo, Esquire, of Colombo and Stuhr, P.L.L.C., 1054 Maple Drive, Morgantown, West Virignia 26505; and City Hospital, Inc., represented by Kenneth J. Barton, Esquire, of Steptoe and Johnson, 126 East Burke Street, P.O. Box 2629, Martinsburg, West Virginia 25402-2629.

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[1] As pointed out below, Mr. Britt is a member of the Virginia State Bar and maintains a law office in Winchester, Virginia.

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OPINIONS BELOW

This case is a civil action originating in the Circuit Court of Berkeley County, West Virginia. Petitioner, Winchester Medical Center, filed a Motion to Dismiss for lack of in personam jurisdiction. The Circuit Court of Berkeley County denied Winchester Medical Center's motion on August 31, 2000. [is the order reported?] Petitioner filed the Petition for Writ of Prohibition, which was denied by the West Virginia Supreme Court of Appeals on December 12, 2000, without a written opinion. [reported anywhere?] Petitioner also filed the Petition for Leave to Renew Petition for Writ of Prohibition, which was ultimately denied by the West Virginia Supreme Court of Appeals on February 8, 2001.

STATEMENT OF JURISDICTION

This Petition follows the refusal of the West Virginia Supreme Court of Appeals to consider Winchester Medical Center's Petition for a Writ of Prohibition by Order dated December 12, 2000 which was refused a rehearing on January 11, 2001 and February 8, 2001. (Appendices B, C & D) Jurisdiction is conferred on this Court by 28 U.S.C. § 1257. See Madruga v. Superior Court of the State of California, 346 U.S. 556, 557, n.1 (1954) ("The State Supreme Court's judgment finally disposing of a writ of prohibition is a final judgment reviewable [in the United States Supreme Court] under 28 U.S.C. § 1257"); see also World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286 (1980) (certiorari granted to review Oklahoma Supreme Court's denial of a writ of prohibition to prevent the trial court from exercising in personam jurisdiction).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitutional Amendment XIV § 1:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd(a) provides:

> In the case of a hospital that has a hospital emergency department, if any individual . . . comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition . . . exists.

Fair Debt Collection Practices Act, 15 U.S.C. § 1692i(a)(2) provides:

> Any debt collector who brings any legal action on a debt against any consumer shall--
>
> (2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity--
>
> (A) in which such consumer signed the contract sued upon; or
>
> (B) in which such consumer resides at the commencement of the action.

West Virginia Code § 31-1-15 provides in pertinent part:

> For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this state pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this state, (b) if such corporation commits a tort, in whole or in part, in this state, or (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this state notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this state at the time of said injury.

West Virginia Code § 56-3-33(a)(1), (4) provides in pertinent part:

> (a) The engaging by a nonresident, or by his duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent . . . shall be a signification of such nonresident's agreement that any such process against him, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this state:
>
> (1) Transacting any business in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state. . . .

STATEMENT OF THE CASE

Winchester Medical Center seeks this Court's protection against an unconstitutional usurpation of judicial power being exercised across state lines in violation of the Due Process Clause of the Fourteenth Amendment.

Michelle R. Pevarnik and Darren Pevarnik, husband and wife, filed an action for medical malpractice against Winchester Medical Center and others on September 15, 1999, in the Circuit Court of Berkeley County, West Virginia. (Appendix E) She alleges a failure to make a timely diagnosis of a condition called Stevens-Johnson syndrome. On September 16, 1999, Michelle Pevarnik also filed in the Circuit Court of Winchester, Virginia, a companion medical malpractice lawsuit arising out of the same set of operative facts alleged in the present case.[2] (Appendix F) In both the West Virginia and Virginia

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[2] The Virginia lawsuit named Winchester Medical Center as a defendant, along with the individual emergency doctors who treated her in the emergency department at Winchester Medical Center. The individual emergency physicians are not parties to the West Virginia suit. On March 27, 2000, Michelle Pevarnik moved for and was granted a dismissal by voluntary nonsuit by the Circuit Court of the City of Winchester. In Virginia, a plaintiff has a statutory right to one dismissal by nonsuit, Va. Code § 8.01-380(B), and may refile the action within the original period of limitation or within six months of the date of nonsuit, whichever is later. Va. Code § 8.01-229(E)(3). Ms. Pevarnik refiled the identical lawsuit in Winchester on or about October 4, 2000, before any resolution of the West Virginia jurisdiction issues, and the parties are at issue in the Circuit Court of the City of Winchester, Virginia.

cases, the sole theory of liability against Winchester Medical Center was that it is vicariously liable for the actions of the emergency physicians who treated Michelle Pevarnik in the Winchester Medical Center emergency department on September 19, 20 and 21, 1997.

Winchester Medical Center filed a motion to dismiss under Rule 12(b)(2) of the West Virginia Rules of Civil Procedure challenging the complaint on the bases that Winchester Medical Center is not subject to jurisdiction in West Virginia because West Virginia's long-arm statutes do not apply; and that the exercise of jurisdiction by West Virginia in this case violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The sole jurisdictional allegation upon which the Pevarniks attempt to keep Winchester Medical Center in court in West Virginia is that Winchester Medical Center does "substantial business in Berkeley County, West Virginia . . .". (Complaint ¶ 4, Appendix E)

The Pevarniks conducted jurisdictional discovery, the extent of which was interrogatories and a request for production of documents. Winchester Medical Center's responses to those requests comprise the evidentiary record on jurisdiction which shows only the following contacts by Winchester Medical Center with West Virginia: (1) Winchester Medical Center has limited telephone book listings in West Virginia;[3] (2) Winchester Medical

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[3] The telephone book listings consist of the following: (1) one white page and one yellow page listing in the 1997-1998 Martinsburg-Berkeley Springs, West Virginia telephone book; (2) one white page and one yellow pages listing in the 1997 Jefferson County, West Virginia telephone book; (3) one white page and one yellow page listing in the 1996-1997

Center's parent company, Valley Health System, places extremely limited newspaper advertisements concerning Winchester Medical Center; Winchester Medical Center places no such ads itself;[4] (3) Winchester Medical Center has applied for and received a West Virginia Medicaid billing number; (4) approximately 29,224 West Virginians came to Winchester Medical Center for medical care in 1995, 29,584 in 1996, and 31,423 in 1997; (5) revenue received by Winchester Medical Center for treatment of West Virginians was approximately $38,412,951 in 1994, $42,150,920 in 1995, and $46,060,920 in 1996; and (6) the number of civil collections actions filed by Winchester Medical Center against West Virginians was approximately 96 in 1995, 251 in 1996, and 444 in 1997. Those facts are undisputed.

On this record, the trial court entered an order on August 31, 2000, denying Winchester Medical Center's Motion to Dismiss. (Appendix A) The trial court relied on the following "jurisdictional" factors: Winchester Medical Center has a history of treating patients from Berkeley County and many physicians who practice at Winchester Medical Center also have satellite offices in Berkeley County and Jefferson County, West Virginia;

Washington County, West Virginia telephone book; and one yellow page listing in the 1997 Lost River/South Fork, West Virginia telephone book.

[4] The fact that Winchester Medical Center's parent company, Valley Health System, places advertisements in newspapers which are distributed in West Virginia, does not qualify as an activity performed by Winchester Medical Center itself. See discussion concerning contacts not imputable to another, infra, page 14.

Winchester Medical Center files collection actions in Berkeley County, West Virginia; Berkeley County, West Virginia and Frederick County, Virginia, share a common border; Martinsburg, West Virginia and Winchester, Virginia, are separated by only approximately twenty-five miles; the West Virginia border is approximately ten miles from Winchester; Martinsburg, West Virginia, and Winchester, Virginia, are both located on Interstate Highway 81; Winchester Medical Center solicits business in the Berkeley County area through advertising and doctors who enjoy hospital privileges at Winchester Medical Center "funnel" patients there.

Of the foregoing factors relied on by the trial court, the following matters were never made part of the record by either the introduction of evidence or stipulation: that Winchester Medical Center has a long history of treating patients from the Berkeley County area; a number of doctors whose practices center at Winchester Medical Center and perform surgery at that hospital also have offices in Berkeley County, West Virginia, where they regularly treat West Virginians; that doctors practicing at Winchester Medical Center funnel patients to Winchester Medical Center. These "facts" relied on by the trial court were neither asserted nor argued by the parties. It is unknown how the trial court acquired this "evidence."

On November 14, 2000, Winchester Medical Center petitioned the West Virginia Supreme Court of Appeals to issue a writ of prohibition to the Circuit Court of Berkeley County directing it to abandon jurisdiction over Winchester Medical Center for the same reasons raised in the trial court. On December 12, 2000, the West Virginia Supreme Court of Appeals, without opinion, denied Winchester Medical Center's petition. (Appendix B)

On January 9, 2001, Winchester Medical Center moved the West Virginia Supreme Court of Appeals for rehearing, which was rejected by the Clerk of court on procedural grounds. (Appendix C) On January 29, 2001, Winchester Medical Center petitioned the West Virginia Supreme Court of Appeals for leave to renew its Petition for Writ of Prohibition and specifically requested issuance of an opinion for the benefit if this Court. Leave to renew was denied on February 8, 2001, again without an opinion. (Appendix D)

Accordingly, Winchester Medical Center requests this Court, following its review of the record, points, and authorities, to direct the West Virginia Supreme Court of Appeals to issue a writ of prohibition to the Circuit Court of Berkeley County, pursuant to the Court's authority under 28 U.S.C. § 2106 and the "All Writs Act," 28 U.S.C. § 1651(a). See also United States v. New York Tel. Co., 434 U.S. 159, 172-73 (1977)("a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.").

REASONS FOR GRANTING THE WRIT

I. THE REASONS UPON WHICH THE TRIAL COURT RELIED TO RETAIN JURISDICTION FAIL TO PASS CONSTITUTIONAL MUSTER.

A. The Constitutional Due Process Standard: Purposeful Availment.

The Due Process Clause of the Fourteenth Amendment mandates that no defendant may be haled into court unless he has "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

> "The constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (citations omitted) (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (citation omitted) (1945) .... [M]inimum contacts must have a basis in "some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id. at 475 (citation omitted). 'Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." Ibid., quoting McGee v. International Life Insurance Co., 355 U.S. 220, 223 (citations omitted) (1957) (emphasis in original).

Asahi Metal Indus. Co., Ltd., v. Superior Court of California, 480 U.S. 102, 109 (1987). Thus, a foreign defendant is denied due process of law when a state exercises personal jurisdiction over him without sufficient contacts to demonstrate "purposeful availment" by the foreign defendant. Helicopteros Nationales De Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

Analysis of jurisdiction over a non-resident defendant requires a two-step approach: (1) do the defendant's actions satisfy the forum state's long-arm statutes; and (2) are the defendant's jurisdictional contacts sufficient to satisfy constitutional due process standards. See Helicopteros Nationales De Columbia, S.A. v. Hall, 466 U.S. 408, 412-13 (1984); see also Grove v. Maheswaran, 201 W.Va. 502, 505, 498 S.E.2d 485, 488 (1997) (per curiam) (recognizing that West Virginia applies the two-prong analysis). Application of the two-prong analysis requires the state court to address due process issues along with the applicability that state's long-arm statutes See Honeyman v. Hanan, 300 U.S. 14, 20 (1937) ("It must appear that [the state court's] decision was necessary to the determination of the cause, and that [the federal question] was actually decided, or that the judgment as rendered could not have been decided without it.").

Thus, because the due process requirements articulated by this Court in International Shoe define the extent of West Virginia's potential jurisdiction over nonresidents, the West Virginia Supreme Court of Appeals must be presumed to have addressed the jurisdictional due process issues raised, even in the absence of an opinion by that court. However, under due process standards as set forth

by this Court, the West Virginia Supreme Court erred in keeping jurisdiction over Winchester Medical Center.[5, 6]

B. The Trial Court's Decision Must Be Evaluated Under The General Jurisdiction Standard It Applied.

In personam jurisdiction is said to be either "general" or "specific." If the cause of action arises out of or relates to the defendant's activities in the forum state, then the state is exercising "specific jurisdiction." Helicopteros, 466 U.S. at 414, n.8. "[U]nilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Id. at 417, quoting Hanson v. Denckla, 357 U.S. 235, 253 (citations omitted) (1958). When a state "exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum," it is exercising "general jurisdiction." Id. at 414, n.9. As recently as last December, this Court reiterated its requirement that a full articulation of a state court's decision involving mixed questions of state and

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[5] Winchester Medical Center does not seek review of whether the West Virginia Supreme Court correctly interpreted West Virginia's long-arm statutes. See W.Va. Code §§ 31-1-15, 56-3-33. The issue is whether West Virginia's application of those statutes comports with this Court's construction of the Due Process Clause. See Helicopteros Nationales De Columbia, S.A. v. Hall, 466 U.S. 408, 412-13 (1984).

[6] A decision to retain jurisdiction is reviewed de novo. See Cubbage v. Merchant, 744 F.2d 665, 667 (9th Cir. 1984), citing World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980).

federal law. See Bush v. Palm Beach County Canvassing Board, ____ U.S. ____, 121 S. Ct. 471 at 475 (December 4, 2000), citing Minnesota v. National Tea Co., 309 U.S. 551 (1940).

In this case, in order for the trial court to have found that it has specific jurisdiction over Winchester Medical Center, it would have had to find that the alleged tort arose out of the jurisdictional contact. Under the facts in this record, that means that it would have had to make a finding that Michelle Pevarnik went to Winchester Medical Center because of Winchester Medical Center's alleged jurisdictional contacts with West Virginia. The trial court's Order denying Winchester Medical Center's motion to dismiss contains no such determination. Not only was there no such finding, the Pevarniks have never made that argument even though invited repeatedly to do so in the pleadings. The undisputed facts in the record fail to establish the requisite nexus between Winchester Medical Center's "contacts" with West Virginia and the cause of action asserted by the Pevarniks. The record, therefore, is devoid of the type or quality of evidence that warrants the exercise of specific personal jurisdiction.

Because the Pevarniks' claims do not "arise out of" Winchester Medical Center's contacts, the trial court must have applied a general jurisdiction standard.

C. The Record Utterly Fails To Demonstrate Purposeful Minimum Contacts By Winchester Medical Center.

No party and no court other than the Circuit Court of Berkeley County has suggested that there is any jurisdictional relevance to the fact that a foreign

corporation's sole place of business is located near a state border; that a foreign corporation hires a law firm to collect bad debts in the state asked to retain jurisdiction; that activities in another state by independent physicians not employed by a hospital are attributable to the hospital; that there is a history of patients of one state traveling across state lines to obtain medical services; that two counties border each other in sister states;[7] that the venue of the action and the locus of the foreign corporation are within a certain radius; or that cities in different states are accessible via the same highway.

1. Winchester Medical Center's proximity to West Virginia is an irrelevant constitutional consideration.

The accident of history that places Winchester Medical Center near West Virginia does not qualify as a purposeful interjection into West Virginia. Winchester Medical Center's physical plant and operations are located exclusively in the City of Winchester, Virginia, and nothing about its physical location touches West Virginia. The trial court erroneously relied on the fact that the City of Winchester, Virginia, and Martinsburg, West Virginia are both located on the same interstate, Interstate 81. That fact is constitutionally irrelevant and expands the scope of due process minimum contacts beyond any scope recognized heretofore by any court.

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[7] Actually, the trial court is incorrect on this point--Winchester Medical Center is located in the City of Winchester, an independent city, which is NOT contiguous with the Virginia/West Virginia border.

Furthermore, Ms. Pevarnik was not required to seek treatment at Winchester Medical Center. "People and their physicians choose hospitals for a variety of reasons. Proximity is merely one of those reasons." Wolf v. Richmond County Hosp. Auth., 745 F.2d 904, 908 (4th Cir. 1984), cert. denied, 474 U.S. 826 (1985). In Wolf, the fact that the nonresident hospital was located thirty minutes from the forum state county where the plaintiff resided and two forum state hospitals were each over a one and one-half hours drive from the plaintiff was determined to be inconsequential in the minimum contacts analysis. Id. Almost identical facts are in play in this case. The fact that Winchester Medical Center is approximately a thirty minute drive from the county in the forum state where Mrs. Pevarnik resides is wholly irrelevant.

2. Actions of independent physicians who practice at Winchester Medical Center and in West Virginia are not chargeable to Winchester Medical Center.

The trial court erroneously relied upon the fact that private doctors not employed by Winchester Medical Center maintain offices in West Virginia. This is an improper basis on which to establish jurisdiction because jurisdictional contacts must be personal; they cannot be imputed to another person or entity. In Burger King, this court said that jurisdiction is proper only where the minimum contacts proximately result from the defendant's own actions. See Burger King, 471 U.S. at 475. " 'Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State.' " Id., quoting McGee v. International Life Insurance Co., 355 U.S. 220, 223 (citations omitted) (1957) (emphasis in

original). The only contacts that may be properly considered are those of Winchester Memorial Hospital, and no other.

3. Winchester Medical Center's history of treating West Virginians is irrelevant.

Whether or not Winchester Medical Center has treated West Virginians is irrelevant because the delivery of medical care to those patients, just like Mrs. Pevarnik, was performed in Virginia. The fact that Winchester Medical Center treats patients from a state other than Virginia does not establish any purposeful act by Winchester Medical Center with that state. Unilateral activity by the plaintiff is not enough to confer jurisdiction over a nonresident defendant. Helicopteros, 466 U.S. at 417, quoting Hanson v. Denckla, 357 U.S. 235, 253 (citations omitted) (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.") As stated above, under a minimum contacts analysis, the contact must result from the defendant's own actions. See Burger King, 471 U.S. at 475. The contacts Winchester Medical Center has with West Virginia patients, like Mrs. Pevarnik, results from the patients' action of traveling to Virginia for medical care and treatment.

4. Winchester Medical Center's scant telephone book listings are too meager to vault the high hurdle necessary for a finding of general jurisdiction.

Under a general jurisdiction analysis, the nature of a foreign defendant's activities with the forum state must rise to the level of "continuous and systematic general

business contacts." Helicopteros, 466 U.S. at 415-16. This is a much higher standard than for specific jurisdiction which simply must "arise out of" the jurisdictional contact. For general jurisdiction, due process requires a showing of continuous and systematic contacts. Id. Mere telephone book listings do not rise to the required level.

General business listings, like the Winchester Medical Center listings, appear routinely in telephone books in contiguous counties in every state.[8] Although telephone book listings exist in the directory for Martinsburg-Berkeley Springs, West Virginia, the area near where the Pervarniks reside, there is no listing that specifically advertises or solicits patients to come to the emergency room at Winchester Medical Center. Such listings do not demonstrate "continuous and systematic general business contacts" in West Virginia by Winchester Medical Center.

By contrast, in Helicopteros, the foreign corporations contacts with Texas included sending personnel for training, sending the chief executive officer to negotiate a contract, and purchasing training equipment, services and helicopters from a business located in Texas. Id. at 416. However, this Court held that those contacts were constitutionally insufficient to create general jurisdiction over the foreign defendant in Texas. Id. at 416. Moreover, this Court specifically suggested several types of contacts that might be indicia of continuous business contacts, which, as in the present case, were absent in Helicopteros: (1) having an agent for service of process in the forum

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[8] See supra, footnote 3.

state; (2) signing contracts in the forum state; (3) soliciting business in the forum state; (4) having an employee based in the forum state; (5) owning real property in the forum state; (6) maintaining an office or records in the forum state; and (7) having shareholders in the forum state. None of those types of contacts exist in present in this case.[9]

Furthermore, "mere purchases, **even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.**" Id. at 418 (emphasis added). If that is so, then telephone book listings are not enough to warrant a West Virginia's assertion of general in personam jurisdiction over Winchester Medical Center. The universal practice of placing business listings in telephone directories which cross state lines does not demonstrate the degree of purposeful availment required by Helicopteros.

D. Inconsistent Decisions Resulting From Application Of A General Jurisdiction Standard In This Case And Others Similar To It Weigh In Favor Of This Court's Attention.

The determination of whether a state may properly exercise general jurisdiction over a foreign corporation based on the delivery of personal services was summarized

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[9] While the trial court opinion states that Winchester Medical Center "solicits" business in the Berkeley County, West Virginia area, the facts in the record do not support that finding. See discussion pertaining to solicitation, infra, page 21.

well by the court in Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1990), rev'd on other grounds, 499 U.S. 585 (1991)(emphasis added). As stated in that case,

> [t]he level of contact with the forum necessary to establish general jurisdiction is quite high. See, Helicopteros Nacionales de Columbia, S.A. v. Hall, supra (no general jurisdiction over foreign corporation that sent officers to forum for a negotiating session, accepted checks drawn from a forum bank, purchased equipment from the forum, and sent personnel to the forum to be trained); Cubbage v. Merchant, 744 F.2d 665, 667-68 (9th Cir. 1984), cert. denied, 470 U.S. 1005 (1985) (no general jurisdiction over non-resident doctors despite significant number of patients in forum, use of forum state's medical insurance system and telephone directory listing that reached the forum); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (no general jurisdiction over defendants despite several visits and purchases in forum, solicitation of contract in forum which included choice of law provision favoring forum and extensive communication with forum), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985); Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240, 1242-43 (9th Cir. 1984), (foreign corporation's sales and marketing efforts in forum state, including solicitation of orders, promotion of products to potential customers through the mail and through showroom displays, and attendance at trade shows and sales meetings, were insufficient contact to assert general jurisdiction.

Shute, 897 F.2d 377 at 380-81.

Applying similarly recognized principles, a federal district court in New Mexico found a lack of personal jurisdiction over out-of-state doctors and hospitals where the plaintiff-patients left the forum state to receive services for medical treatment in another state. See Pelton v. Methodist Hospital, et al., 989 F.Supp. 1392 (D.N.M. 1997). Although the defendant hospital advertised[10] in the forum state, Id., the court specifically pointed out that (like Ms. Pevarnik) there was no allegation or evidence that the plaintiff-patient was influenced to seek treatment at the defendant hospital because she had not actually seen the ad. Id. The ad in question solicited nurse applicants for employment opportunities. Although different than an advertisement for the hospital itself, the analysis is the same because the determining factor is whether the evidence shows that the patient sought the treatment based upon any advertisement.

The plaintiff in Pelton failed to demonstrate the required relationship between the nonresident defendant hospital's contacts and her cause of action. Id. at 1394; The court held that the "want-ads" for nurses did not

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[10] A large portion of the Pevarnik's argument in the trial court was that contacts with West Virginia by Winchester Medical Center's parent corporation, Valley Health Systems (of Winchester, Virginia), are imputable to Winchester Medical Center. The plaintiffs would have the court breach the corporate structures of these separate companies. However, none of Valley Health Systems' contacts with West Virginia are legally sufficient to justify piercing the corporate veil between Valley Health Systems and Winchester Medical Center. See Bowers v. Wurzburg, 202 W.Va. at 53-54, 501 S.E.2d at 489-90 (1998) (setting out a list of factors to be considered). The record contains no evidence pertinent to an analysis of the Bowers factors, and neither the Pevarniks nor the trial court addressed this issue.

satisfy the purposeful availment standard. Id. at 1395. The court's decision in Pelton is consistent with the analysis under a "general jurisdiction" theme. The idea that personal services jurisdiction is proper only in the state where the service was performed comports with constitutional due process concerns.

In Glover v. Wagner, 462 F.Supp. 308 (D. Neb. 1978) a federal district court sitting in diversity focused on the place where personal services are rendered and found no jurisdiction under the state's long-arm statute where the plaintiff was not solicited and had voluntarily traveled across state lines for medical care. Although the court found that Nebraska's long-arm statute was "as broad as the constitutional standard of due process . . .", Id. at 310, it reasoned that if it sustained jurisdiction based upon such contacts, it would effectively ignore the territorial limitations on the power of the states. Id. at 312 (citing Hanson v. Denckla, 375 U.S. 235, 251 (1958)).

In Glover, the Nebraska long-arm statute was very similar to West Virginia's long-arm statute. For example, both long-arm statutes state that personal jurisdiction may be exercised if the cause of action arises from the person's "transacting business" in the state. See id. at 309; see also W.Va. Code § 56-3-33. Merely accepting and treating patients was held not to qualify as a "business transaction" within the meaning of Nebraska's long-arm statute.

Some courts have focused less on the nature of health care as a personal service, and more on a "stream of commerce" analogy. For example, in Presbyterian Univ. Hosp. v. Wilson, 99 Md.App. 305 (Md. Ct. Spec. App. 1994), aff'd, 654 A.2d 1324 (Md. 1995), the court held that the defendant hospital had constitutionally sufficient

contacts with the forum state because it placed its name in a referral service in the forum state. See Id. at 322.

However, a particular area where due process concerns arise is in the distinction between a mere "advertisement" and direct "solicitation" of patients. Some courts have focused on the difference between an advertisement and a solicitation of business. "It is clear that when a client or patient travels to receive professional services without having been solicited (which is prohibited by most professional codes of ethics),[11] then the client, . . . ought to expect that he will have to travel again if he thereafter complains that the services . . . were rendered improperly." Glover, 462 F.Supp at 312 (citing Gelineau v. New York Univ. Hosp., 375 F.Supp. 661, 667 (D.N.J. 1974). Moreover, a telephone directory listing does not necessarily "indicate a purposeful contact in order to generate revenue but instead illustrates the proximity of and the close ties existing [between the two counties of two states]." Wolf v. Richmond County Hosp., 745 F.2d 904, 910 (4th Cir. 1984), cert. denied, 474 U.S. 826 (1985).

Other courts have focused on the need for a showing of direct "solicitation." In Nicholas v. Ashraf, 655 F.Supp. 1418 (W.D. Pa. 1987), the plaintiff asserted jurisdiction based on her referral to a West Virginia hospital by her Pennsylvania physician, who had received mail

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[11] The American Bar Association Model Rules of Professional Conduct is instructive on this point. An attorney may "advertise" services in the newspaper, phone directory, or otherwise through the media. See ABA M.R.P.C. Rule 7.2. However, an attorney is prohibited from directly "soliciting" clients through written communications or in-person or telephone contact. See ABA M.R.P.C. Rule 7.3.

solicitations from the hospital; and because the West Virginia hospital accepted payments from the Pennsylvania Department of Welfare for treating Pennsylvanians. The court determined that this type of indirect solicitation and the acceptance of the forum state's welfare reimbursement did not constitute purposeful availment of the rights and privileges of doing business in Pennsylvania so as to establish personal jurisdiction under a minimum contacts analysis. Id. at 1419. The court held, specifically, that personal jurisdiction did not exist over the West Virginia hospital and two West Virginia physician defendants where the facts did not show "direct solicitation," even though the patient-plaintiff traveled to West Virginia for medical care and accepted the treatment. See Id. at 1418 (W.D. Pa. 1987). Furthermore, the court held that neither indirect solicitation, nor acceptance of forum state's welfare reimbursement constituted purposeful availment. Id. at 1419.

However, some jurisdictions have found a sufficient jurisdictional nexus between services rendered and direct solicitation through advertisements alone. A federal district court in Rhode Island held that a hospital that for three years "solicited" out-of-state customers through television and newspaper advertisements and referrals from other entities had "purposely availed" itself to the forum state and, thus, was subject to Rhode Island jurisdiction. See Soares v. Roberts, 417 F.Supp. 304, (D.R.I.1976).

The findings in Soares conflicts with the holding in Wolf, where the court determined that the listing of a foreign hospital in telephone directories in the forum state "does not indicate a purposeful contact in order to generate revenue but is merely demonstrative of the proximity of

and the close ties existing between [the two states' contiguous counties]. Wolf 745 F.2d at 910. Furthermore, a telephone listing, alone, without some evidence of advertising or solicitation by the foreign corporation, does not, in and of itself, amount to "regular solicitation of business." Id., quoting Kennedy v. Ziesmann, 526 F.Supp. 1328 (E.D.Ky. 1981).

In Cubbage v. Merchant., 744 F.2d 665 (9th Cir. 1984), the court held that while a single telephone book listing alone is insufficient to confer jurisdiction, solicitation of patients through advertisements in phone books may be enough to effect personal jurisdiction when the circulation was so broad and the advertisement so large it could not be characterized as "random." Cubbage, 744 F.2d at 669.[12]

Moreover, the findings of fact which led to a determination of "continuous" business activities in Cubbage, resulted in a different holding in Wolf. In Cubbage, the court found specific jurisdiction, stating that because of the telephone book listings and participation in a the forum state's medicaid program, the appellant's claim actually "arose out of or resulted from" the nonresident hospital's activities. Cubbage, 744 F.2d at 670. By contrast, based on very similar facts, the court in Wolf determined that "[f]inding the exercise of jurisdiction in the [forum state] would not be consistent with due process." Wolf, 745 F.2d at 911, citing Gelineau, 375

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[12] Moreover, West Virginia has already determined that the Cubbage factors are insufficient to confer jurisdiction over a foreign hospital in West Virginia. See Grove v. Maheswaran, 201 W.Va. 502, 498 S.E.2d 485 (1997) (no jurisdiction over foreign hospital); Lane v. Boston Scientific Corp.,198 W.Va. 447, 481 S.E.2d 753 (1996) (no jurisdiction over foreign hospital).

F.Supp at 667. The critical difference is well articulated by the Wolf court, stating the distinguishing factor to be whether "the defendant either actively solicited or encouraged the nonresident to travel to their facility for treatment. . . ." Id. at 912, citing to Cubbage.

The inconsistent results of the foregoing cases may be explicable based on whether one views health care as a personal service of a product. This Court's jurisdiction decisions have most often dealt with jurisdiction over companies in the business of delivering goods across state lines. The different character of personal service cases merits a critically different analysis than the minimum contacts analysis used in stream of commerce cases like World-Wide Volkswagen and Asahi. A medical malpractice case, such as this, does not involve "a product which was deliberately shipped into the forum state's markets." Gelineau v. New York Univ. Hosp., 375 F.Supp. 661, 667 (D.N.J. 1974). Instead, the focus is the personal professional service rendered to the patient. Id.

> When one seeks out services which are personal in nature, such as those rendered by attorneys, physicians, dentists, hospitals, or accountants, and travels to the locality where he knows the services will actually be rendered, he must realize that the services are not directed to impact on any particular place, but are directed to the needy person himself. [If such services] are negligently done, their consequences will thereafter be felt whenever the client or patient may go, it would be **fundamentally unfair** to permit a suit in whatever distant jurisdiction the patient may carry the consequences of his treatment, or the client the consequences of the advice received.

Id. (emphasis added). Even under the traditional "stream of commerce" theory for products which end up in the forum state, the importance of medical treatment as a personal service, and distinguishing it from traditional "stream of commerce" logic is recognized by some courts. Id. at 667-668; see also Wright v. Yackley, 459 F.2d 287, 289-290 (9th Cir. 1972).

Because of the inconsistencies in analysis and results shown by the above decisions, this Court should grant certiorari to review these important developing issues.

II. COMPLIANCE WITH FEDERAL LAW IS NOT SUFFICIENT TO ESTABLISH PURPOSEFUL AVAILMENT.

The trial court relied on two other reasons for sustaining jurisdiction over Winchester Medical Center: (1) that there is a history of West Virginia patients being treated at Winchester Medical Center; and (2) that Winchester Medical Center litigates collection actions in West Virginia. Neither of these facts establish purposeful availment; rather, they are irrelevant to the consideration of jurisdiction.

With regard to the facts relied upon by the trial court concerning treatment of West Virginians, Winchester Medical Center, situated in a Virginia city within a county adjacent to the West Virginia border, certainly expects to treat and be paid for treating West Virginia residents. Indeed, Winchester Medical Center is required by federal law, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd. (EMTALA), to provide a medical screening examination to any patient who comes there. The trial court's finding that jurisdiction attaches

because of the unilateral act of a West Virginian traveling into Virginia for medical services is untenable. The appropriate question is not whether jurisdiction follows the West Virginia resident into Virginia, but whether Winchester Medical Center's reach goes sufficiently into West Virginia that it should reasonably expect to be sued there.

In the same vein, lawsuits filed by Winchester Medical Center in West Virginia to collect bad debts are not a constitutionally cognizable "purposeful interjection into the forum state" when, pursuant to the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692i(a)(2), proper venue for such action lies where the debtor resides or the contract is made. The issue then, is whether Winchester Medical Center must initially pursue collection actions in the Commonwealth of Virginia to avoid general West Virginia jurisdiction; or does bringing collection actions in West Virginia in accordance with the Fair Debt Collection Practices Act amount to purposeful availment of the rights and privileges of the State of West Virginia sufficient to confer general jurisdiction in West Virginia. That issue deserves this Court's explication.

III. THE RULINGS BELOW IGNORE THE SOVEREIGNTY OF A SISTER STATE AND, IF LEFT TO STAND, WILL TRAMPLE CONSTITUTIONAL CONCEPTS OF FEDERALISM.

The principles of federalism here at stake can be articulated with no greater eloquence than by this Court in 1980:

The concept of minimum contacts . . . protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness."

* * *

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

* * *

[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. . . .

As . . . noted in Hanson v. Denckla:

[I]t is a mistake to assume that [expansion of personal jurisdiction] heralds the

> eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.
>
> * * *
>
> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen, 444 U.S. at 291-94 (citations omitted) (emphasis added).

Jurisdictional analysis, therefore, may not occur in a vacuum. It must consider and give due respect to the distinct character and competing interests of differing sovereigns and their residents. See Asahi, 480 U.S. at 113. The considerations of federalism to be considered to determine the reasonableness of the exercise of jurisdiction are: (1) the interests of the forum state; (2) the plaintiff's interests in obtaining relief; and (3) the burden on the defendant. Id. The exercise of jurisdiction by West Virginia over Winchester Medical Center fails under such an analysis.

First, the interests of West Virginia are not so great as to outweigh due process concerns. In a tort case such as this, West Virginia has long recognized the doctrine of lex loci delicti as the cornerstone of its conflict of laws doctrine. Paul v. National Life, 177 W.Va. 427, 432, 352 S.E.2d 550, 555 (1986); see also Armor v. Lantz, 207 W.Va. 672, 535 S.E.2d 737 n.8 (2000). Regardless of where this case is tried, therefore, Winchester Medical Center should be tried under substantive Virginia law.

Second, Michelle Pevarnik has twice demonstrated her willingness, ability and resources to bring an action in Virginia to enforce her rights.[13] Indeed, she sought medical care in Winchester. Her attorney below, Terrence Britt, is a member of the Virginia State Bar and maintains a law office in Winchester, Virginia. The burden on her to try this case in Winchester is certainly no greater (and perhaps less) than Winchester Medical Center's burden of trial in Martinsburg.

Third, public policy weighs against jurisdiction under the trial court's reasoning. The trial court's assertion of jurisdiction on factors such as the fact that it sits in a county that is contiguous to a county in another state where the defendant has its place of business; or that Winchester Medical Center is only ten miles from West Virginia; or that West Virginians unilaterally go to Virginia for medical care; or that Winchester, Virginia, and Martinsburg, West Virginia, are both located near Interstate Highway 81, strains to the breaking point long-respected tenets of federalism. Would federalism, under such facts, tolerate a lawsuit against Winchester Medical

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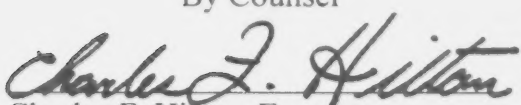
[13] See supra, footnote 2.

Center in the Circuit Court of Berkeley County, West Virginia, by a Missouri resident who goes to Winchester Medical Center's emergency department while traveling southward on Interstate 81 out of West Virginia, simply because that highway runs through both cities? Being mindful that the Missouri resident's visit to Winchester Medical Center would be no more likely to arise out of the alleged jurisdictional contacts in this case than does the Pevarniks' claim, the reasoning of the trial court would support such an erasure of state boundaries. Winchester Medical Center submits that it is from such burdens that the Due Process Clause protects foreign defendants.

IV. CONCLUSION

For all the foregoing reasons, Winchester Medical Center respectfully requests that this Court grant the Petition for Writ of Certiorari and to direct the West Virginia Supreme Court of Appeals to issue a writ of prohibition to the Circuit Court of Berkeley County, West Virginia.

Respectfully Submitted,
WINCHESTER MEDICAL CENTER, INC.
By Counsel



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(540) 434-0316/(540) 434-5502 (facsimile)
Counsel for Petitioner

APPENDIX A

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

Michelle R. Pevarnik,
Plaintiff,

vs. Civil Action # **99-C-413**

City Hospital, Inc., et al.,
Defendants.

-- Order --
Medical Center's Motion To Dismiss Denied

This **August 31, 2000**, the Court rules upon the Defendant Winchester Medical Center's Motion to Dismiss for Lack of Personal Jurisdiction after substantial consideration.

On March 31, 2000, the Court granted the Plaintiff the right to engage in discovery limited to the jurisdictional issues. The discovery was completed in June of 2000 and the parties have filed supplemented memoranda regarding this Motion to Dismiss. Based on these documents and the record of the case the court makes the following findings of fact and conclusions of law:

1. The Defendant Winchester Medical Center has a long history of treating patients from the Berkeley County area. A number of doctors whose practice centers on the Winchester Medical Center, and whose

surgeries are performed at that hospital, have satellite offices in Berkeley County and Jefferson County, West Virginia, in which they regularly see West Virginians.

2. The Defendant litigates collection actions here in Berkeley County on such a frequent basis that the hospital has a Berkeley County law firm on retainer to handle those matters which comprise a not insignificant portion of the docket of the Magistrate and Circuit Courts.

3. Although in different states, Berkeley County, West Virginia and Frederick County, Virginia physically border each other. The distance from the city of Winchester to Martinsburg, where the Berkeley County Circuit Court is located, is approximately twenty-five (25) miles. The cities are both located on Interstate 81. The West Virginia border is a mere ten (10) miles from Winchester.

4. The Winchester Medical Center solicits business in the Berkeley County area by advertising in this area and through the above mentioned doctors who enjoy its hospital privileges and funnel patients to the Medical Center.

5. For all of the above stated reasons, the court concludes that there is a sufficient amount of contacts between Winchester Medical Center and Berkeley County, West Virginia to subject it to the personal jurisdiction of this court. In addition, this Court concludes that the Winchester Medical Center transacts business within this state and therefore this state has personal jurisdiction over the Defendant through the W. Va. long arm statute.

It is accordingly **ADJUDGED** and **ORDERED** that Defendant Winchester Medical Center's Motion to Dismiss for lack of personal jurisdiction is **DENIED**.

The Defendant's objections are duly noted.

The Clerk shall enter this order as of the date above written and shall send attested copies to counsel of record.

Entered: August 31, 2000

/s/_____
Judge of the Circuit Court

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 12th day of December, 2000, the following order was made and entered:

State of West Virginia ex rel. Winchester Medical Center, Petitioner

vs.) No. 002625

Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, and Michelle R. Pevarnik and Darren Pevarnik, Respondents

On a former day, to-wit, November 15, 2000, came the petitioner, Winchester Medical Center, by Martin & Seibert, and E. Kay Fuller, and Wharton, Aldhizer & Weaver, Charles F. Hilton and Walter P. Sowers, its attorneys, and presented to the Court its petition praying for a writ of prohibition to be directed against the respondents, the Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, and Michelle R. Pevarnik and Darren Pevarnik, as therein set forth.

Upon consideration whereof, the Court is of opinion that a rule should not be awarded and

the writ prayed for by the petitioner is hereby refused. Justice Scott would grant. Justice Starcher did not participate in the consideration or decision of this case.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX C

[State Seal] **SUPREME COURT OF APPEALS** [State Seal]
1900 Kanawha Boulevard, East
State Capitol, Building 1, Room E-317
Charleston, West Virginia 25305
www.state.wv.us/wvsca

[detailed letterhead omitted] [detailed letterhead omitted]

Justice	Justice	Chief Justice	Justice	Justice
Elliott E. Maynard	Robin Jean Davis	Warren R. McGraw	Larry V. Starcher	Joseph P. Albright

January 11, 2001

E. Kay Fuller, Esq.
Martin & Seibert
Post Office Box 1286
Martinsburg, West Virginia 25402

Charles F. Hilton, Esq.
Walter P. Sowers, Esq.
Post Office Box 20028
Harrisonburg, Virginia 22801-7528

RE: ***SER Winchester Medical Center v. Hon. David Sanders-Judge, Supreme Court No.002625***

Dear Counsel:

This will acknowledge receipt of the *Petition for Rehearing* which you recently mailed to this office. The petition for writ of prohibition in the

above-captioned matter was refused by order of this Court dated December 13, 2000.

You cannot file to rehear the above-referenced petition, inasmuch as the Court determined not to grant a rule to show cause. Please refer to Rule 14(b) of the RULES OF APPELLATE PROCEDURE.

If you need any further assistance, please contact this office.

Sincerely,
/s/_____
Rory L. Perry II
Clerk

cc: Pamela Jean Games-Neely, Esq.
Terrance L. Britt, Esq.
Bradley J. Reed, Esq.
Kenneth J. Barton, Jr., Esq.
Dino S. Colombo, Esq.

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of February, 2001, the following order was made and entered:

State of West Virginia ex rel. Winchester Medical Center, Petitioner

vs.) No. 002625

Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, and Michelle R. Pevarnik and Darren Pevarnik, Respondents

On a former day, to-wit, January 29, 2001, came the petitioner, Winchester Medical Center, by Martin & Seibert, and E. Kay Muller, and Wharton, Aldhizer & Weaver, Charles F. Hilton and Walter P. Sowers, its attorneys, and presented to the Court its motion in writing for leave to renew the petition for a writ of prohibition which petition was refused by this Court on the 12th day of December, 2000, for the reasons stated therein.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion.

A True Copy

Attest: /s/_____

Clerk, Supreme Court of Appeals

APPENDIX E

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

MICHELLE R. PEVARNIK and DARREN PEVARNIK, Her Husband, 45 Tabler Drive Kearneysville, West Virginia 25430,	)
Plaintiff,	)
Vs.	)
CITY HOSPITAL., INC. Martinsburg, West Virginia 25401	)
And	) CIVIL ACTION) NO.) 99-C-413
TRUMER J. WAGNER, M.D. do City Hospital, Inc. Martinsburg, West Virginia 25401	)
And	)
WINCHESTER MEDICAL CENTER, INC. 1840 Amherst Street Winchester, Virginia 22601,	)

Defendants.)

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, Michelle R. Pevarnik and Darren Pevarnik, her husband, by their counsel, Britt - Getty Law Offices, sue City Hospital, Inc., Trumer J. Wagner, M.D., and Winchester Medical Center, Inc., Defendants, and state in support:

General Allegations

The Parties

1. The Plaintiff, Michelle R. Pevarnik ("Ms. Pevarnik") and Darren Pevarnik ("Mr. Pevarnik"), her husband, are residents of Kearneysville, Berkeley County, West Virginia.

2. The Defendant, City Hospital, Inc., is a licensed health care facility in Martinsburg, Berkeley County, West Virginia.

3. The Defendant, Trumer J. Wagner, M.D., is a licensed physician and a health care provider who, at all times relevant to these proceedings, was acting as the agent, servant and employee of City Hospital, Inc., within the scope of his employment or agency.

4. The Defendant, Winchester Medical Center, Inc., is a health care facility, having its principal place of business in Winchester, Virginia. Winchester

Medical Center, Inc., does substantial business in Berkeley County, West Virginia, and is subject to the jurisdiction of this Court.

The Claim

5. On September 20, 1997, Ms. Pevarnik sought medical care and treatment at City Hospital, Inc., and Trumer J. Wagner, M.D., undertook the medical care and treatment of Ms. Pevarnik, who presented at that time with pain with the movement of her eyes, watery blisters in her mouth, as well as a sore throat and pain in her eyes, together with some discharge from her eyes. She was observed to have conjunctivitis, low grade fever and malaise. She was diagnosed with viral vesicular stromatitis and discharged by City Hospital, Inc., on that date, September 20, 1997.

6. During the period of September 19, 1997, through October 31, 1997, Ms. Pevarnik, at various times, sought medical care and management at Winchester Medical Center, Inc., through its agents, servants and employees in the Emergency Department, for treatment of bilateral lower abdominal pain until she was diagnosed with Stevens-Johnson Syndrome, lost the sight of her eyes, and was transferred to Johns Hopkins University Hospital at Baltimore, Maryland.

Count One

7. Plaintiff incorporates by reference the General Allegations set fort above as if more fully stated herein.

8. Trumer J. Wagner, M.D., owed a duty of care to the Plaintiff to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the same profession or class to which Trumer J. Wagner, M.D., belongs, acting in the same or similar circumstances.

9. Trumer J. Wagner, M.D., breached his duty of care and failed to exercise that degree of care, skill and learning required or expected of a reasonable and prudent physician and/or health care provider by deviating from the standard of care and/or carelessly and negligently failing to properly diagnose, manage and treat the medical condition of Ms. Pevarnik on September 20, 1997.

10. As a direct and proximate result of the acts of Trumer J. Wagner, M.D., Ms. Pevarnik was injured, which required medical and surgical procedures and hospitalization, has suffered injuries which are permanent in their nature, and she has and will in the future suffer great pain.

11. As a further direct and proximate result of the acts of Trumer J. Wagner, M.D., Plaintiff, Ms. Pevarnik has been caused to incur expenses in and about her medical care and attention and, inasmuch as all or part of her injuries are permanent and lasting in their nature, she will in the future incur expenses for her medical care and attention to treat the injuries which she has sustained.

12. As a further direct and proximate result of the acts of Trumer J. Wagner, M.D., Plaintiff, Ms. Pevarnik, has lost wages, has lost earning capacity, and

will continue to lose wages and earnings in the future, and has suffered a diminution in her ability and capacity to work, earn money, and enjoy a normal life.

WHEREFORE, the Plaintiff, Ms. Pevarnik, prays that she be awarded a judgment against the Defendant, Trumer J. Wagner, M.D., in such amount as a judge or jury shall find, together with interest and costs, and such relief as a court and/or jury may deem just and proper. The minimum jurisdictional amount established for filing this action is satisfied.

Count Two

13. Plaintiff incorporates by reference the General Allegations and the allegations of Count One set fort above as if more fully stated herein.

14. At the time Trumer J. Wagner, M.D., breached his duty of care owed to the Plaintiff, Ms. Pevarnik, he was an authorized agent of City Hospital, Inc., acting within the scope of his agency.

15. City Hospital, Inc., is liable for the acts and omissions of Trumer J. Wagner, M.D., under the doctrine of respondeat superior.

WHEREFORE, the Plaintiff, Ms. Pevarnik, requests compensatory damages from the Defendants, jointly and severally, in a sufficient amount to satisfy her for her injuries, including pre-judgment interest, post-judgment interest, attorneys' fees, and costs. The amount sought satisfies the minimum jurisdictional amount for this Court.

Count Three

16. Plaintiffs incorporates by reference the General Allegations and the allegations of Counts One and Two set fort above as if more fully stated herein.

17. At all times pertinent to this Complaint, the Plaintiffs, Ms. Pevarnik and Darren Pevarnik, were husband and wife.

18. As a direct and proximate result of the acts and omissions by the Defendants, individually and/or through their agents, servants and employees, the Plaintiffs suffered loss, injury and damage to their marital relationship, including a loss of consortium.

19. The loss, injury and damage sustained by the Plaintiffs was solely as a result of the negligence of the Defendants without any negligence by the Plaintiffs.

WHEREFORE, the Plaintiffs, as husband and wife, request the entry of a judgment against the Defendants, jointly and severally, in an amount sufficient to compensate them for their injuries, including the loss of consortium, including pre-judgment interest, post-judgment interest, attorneys' fees, and costs. The amount sought satisfies the minimum jurisdictional amount for this Court.

Count Four

20. Plaintiff incorporates by reference the General Allegations and the allegations of Counts One, Two and Three set fort above as if more fully stated herein.

21. Leroy Caudill, D.O., Carroll H. Fowlkes, D.O., and David W. Powers, M.D., acting as agents,

servants and employees of Winchester Medical Center, Inc., were negligent in, but not limited to, the following:

(a) in failing to properly manage the medical care of Michelle R. Pevarnik;

(b) in failing to adhere to the standard of care in the treatment of Michelle R. Pevarnik;

(c) in failing to recognize the signs and symptoms of Stevens-Johnson Syndrome;

(d) in failing to recognize the signs and symptoms of an immune-complex mediated hypersensitivity reaction in Michelle R. Pevarnik;

(e) in failing to diagnose a life-threatening immune-complex mediated hypersensitivity reaction in Michelle R. Pevarnik in a timely manner and institute appropriate treatment;

(f) in failing to properly treat Michelle R. Pevarnik for Stevens-Johnson Syndrome;

(g) in failing to respond to signs and symptoms of Stevens-Johnson Syndrome;

(h) in failing to obtain proper medical history, diagnostic studies and reports;

(i) in failing to timely administer appropriate and proper medical care for the treatment of Stevens-Johnson Syndrome in Michelle R. Pevarnik;

(j) in failing to obtain appropriate, adequate, competent, and timely consultation for Michelle R. Pevarnik in an emergent manner; and

(k) in failing to respond appropriately to the signs and symptoms of Stevens-Johnson Syndrome in an emergent manner.

22. Winchester Medical Center, Inc., is liable respondeat superior for the negligence of its employees, each operating at all times relevant herein

within the scope of their employment as employees of Winchester Medical Center, Inc.

23. As a direct and proximate result of the negligence of the Defendants, and each of them, and/or their agents, servants and employees, the Plaintiff, Michelle R. Pevarnik, has suffered permanent injuries, including the loss of her sight, was caused to suffer severe pain, mental anguish, disfigurement, embarrassment, loss of enjoyment of life, and loss of ability to lead a normal life, all of which are continuing and permanent.

24. As a further direct and proximate result of the negligence of the Defendants, and each of them, and/or their agents, servant sand employees, the Plaintiff, Michelle R. Pevarnik, was caused to incur and will continue to incur expenses for hospital and medical care, occupational therapy, psychological therapy, custodial care, special function instruction, personal care and attention, and alterations to her environment, all of which are continuing and permanent in their nature.

WHEREFORE, the Plaintiff requests compensatory damages from the Defendant, Winchester Medical Center, Inc., in a sufficient amount to satisfy her for her injuries, including pre-judgment interest, post-judgment interest, attorneys' fees, and costs. The amount sought satisfies the minimum jurisdictional amount for this Court.

PLAINTIFF DEMANDS TRIAL BY JURY.

MICHELLE R. PEVARNIK and
DARREN PEVARNIK
By Counsel

BRITT • GETTY LAW OFFICES

By /s/_____
Terrance L. Britt
WV Bar No. 461

By /s/_____
Bradley J. Reed
WV Bar No. 6800

1509 Charles Town Road
Post Office Box 1800
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APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF WINCHESTER

MICHELLE R. PEVARNIK 45 Tabler Drive Kearneysville, West Virginia 25430, Plaintiff, Vs. WINCHESTER MED1CAL CENTER, INC. 1840 Amherst Street Winchester. Virginia 22601, And LAW 199 LEROY CAUDILL D.O. 1840 Amherst Street Winchester, Virginia 22601, And CARROLL H. FOWLKES, D.O. 1840 Amherst Street	) AT)) NO.) 99-L-

Winchester, Virginia 22601,)
)
And)
)
DAVID W. POWERS, M.D.)
1840 Amherst Street)
Winchester, Virginia 22601,)
)
Defendants.)
_____)

MOTION FOR JUDGMENT

COMES NOW the Plaintiff, Michelle R. Fevarnik, by counsel, and moves for judgment against the Defendants, Winchester Medical Center, Inc., Leroy Caudill, D.O., Carroll H. Fowlke.s, D.O., and David W. Powers, M.D., on the grounds and in the amount as hereinafter set forth:

1. The Plaintiff, Michelle R. Pevarnik, is and was at all times relevant to these proceedings, a resident of Kearneysville. West Virginia.

2. The Defendant, Leroy Caudill, DO., is and for many years past has been licensed to provide medical services in the Commonwealth of Virginia.

3. The Defendant, Carroll H. FOWLKES, D.O., is and for many years past has been licensed to provide medical services in the Commonwealth of Virginia.

4. The Defendant, David W. Powers, M.D., is and for many years past has been licensed to provide medical services in the Commonwealth of Virginia.

5. The Defendants, Leroy Caudill, D.O., Carroll H. Fowlkes, D.O., and David W, Powers, M.D., are, on information and belief, at all times relevant hereto, agents, servants and employees of Winchester Medical Center, Inc., acting within the scope of their authority.

6. The Defendant, Winchester Medical Center, Inc., is and for many years past has been duly licensed to provide health care services in the Commonwealth of Virginia.

7. During the period of September 19, 1997, through October 31, 1997, Defendants. at various times, undertook the medical care and management of the Plaintiff, Michelle R- Pevarnik, for treatment of bilateral lower abdominal pain until she was diagnosed with Stevens-Johnson Syndrome, lost the sight of her eyes, and was transferred to Johns Hopkins University Hospital at Baltimore, Maryland.

8. Leroy Caudill, D.O.. Carroll H. Fowlkes, D.O., and David W. Powers, M.D., were negligent in, but not limited to, the following:

(a) in failing to properly manage the medical care of Michelle R. Pevarnik;

(b) in failing to adhere to the standard of care in the treatment of Michelle R. Pevarnik;

(c) in failing to recognize the signs and symptoms of Stevens-Johnson Syndrome:

(d) in failing to recognize the signs and symptoms of an immune-complex mediated hypersensitivity reaction in Michelle R. Pevarnik;

(e) in failing to diagnose a life-threatening immune-complex mediated hypersensitivity reaction in Michelle R. Pevarnik in a timely manner and institute appropriate treatment;

(f) in failing to properly treat Michelle R. Pevarnik for Stevens-Johnson Syndrome;

(g) in failing to respond to signs and symptoms of Stevens-Johnson Syndrome;

(h) in failing to obtain proper medical history, diagnostic studies and reports;

(i) in failing to timely administer appropriate and proper medical care for the treatment of Stevens-Johnson Syndrome in Michelle R. Pevarnik;

(j) in failing to obtain appropriate, adequate, competent, and timely consultation tor Michelle R. Pevarnik in an emergent manner and

(k) in failing to respond appropriately to the signs and symptoms of Stevens-Johnson Syndrome in an emergent manner.

9. Winchester Medical Center, Inc., is liable respondeat superior for the negligence of its employees, each operating at all times relevant herein within the scope of their employment as employees of Winchester Medical Center, Inc.

10. As a direct and proximate result of the negligence of the Defendants, and each of them, and/or their agents, servants and employees, the Plaintiff, Michelle R. Pevarnik, has suffered permanent injuries, including the loss of her sight, was caused to suffer severe pain, mental anguish, disfigurement,

embarrassment, loss of enjoyment of life, and loss of ability to lead a normal life, all of which are continuing and permanent.

11. As a further direct and proximate result of the negligence of the Defendants, and each of them, and/or their agents, servants and employees, the Plaintiff, Michelle R. Pevarnik, was caused to incur and will continue to incur expenses for hospital and medical care, occupational therapy, psychological therapy, custodial care, special function instruction, personal care and attention, and alterations to her environment, all of which are continuing find permanent in their nature.

WHEREFORE, the Plaintiff demands judgments against these Defendants, jointly and severally, in the amount of One Million Dollars ($1,000,000.00), together with interest from September 19, 1997, at the lawful rate, and her costs in this behalf expended.

PLAINTIFF DEMANDS TRIAL BY JURY.

MICHELLE R. PEVARNIK
By Counsel

BRITT • GETTY LAW OFFICES

By /s/_____
Terrance L. Britt
Virginia Bar No. 33595

1509 Charles Town Road
Post Office Box 1800
Martinsburg, WV 25402
Telephone: (304) 263-5000

APPENDIX G

West Virginia Code § 31-1-15:

Secretary of state constituted attorney-in-fact for all corporations; manner of acceptance or service of notices and process upon secretary of state; what constitutes conducting affairs or doing or transacting business in this state for purposes of this section.

The secretary of state is hereby constituted the attorney-in-fact for and on behalf of every corporation created by virtue of the laws of this state and every foreign corporation authorized to conduct affairs or do or transact business herein pursuant to the provisions of this article, with authority to accept service of notice and process on behalf of every such corporation and upon whom service of notice and process may be made in this state for and upon every such corporation. No act of such corporation appointing the secretary of state such attorney-in-fact shall be necessary. Immediately after being served with or accepting any such process or notice, of which process or notice two copies for each defendant shall be furnished the secretary of state with the original notice or process, together with the fee required by section two [§ 59-1-2], article one, chapter fifty-nine of this code, the secretary of state shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service, or acceptance, as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, to the person to whom notice and process shall be sent, whose name and address were last furnished to the state officer at the

time authorized by statute to accept service of notice and process and upon whom notice and process may be served; and if no such person has been named, to the principal office of the corporation at the address last furnished to the state officer at the time authorized by statute to accept service of process and upon whom process may be served, as required by law. No process or notice shall be served on the secretary of state or accepted by him less than ten days before the return day thereof. Such corporation shall pay the annual fee prescribed by article twelve [ss 11-12-1 et seq.], chapter eleven of this code for the services of the secretary of state as its attorney-in-fact.

Any foreign corporation which shall conduct affairs or do or transact business in this state without having been authorized so to do pursuant to the provisions of this article shall be conclusively presumed to have appointed the secretary of state as its attorney-in-fact with authority to accept service of notice and process on behalf of such corporation and upon whom service of notice and process may be made in this state for and upon every such corporation in any action or proceeding described in the next following paragraph of this section. No act of such corporation appointing the secretary of state as such attorney-in-fact shall be necessary. Immediately after being served with or accepting any such process or notice, of which process or notice two copies for each defendant shall be furnished the secretary of state with the original notice or process, together with the fee required by section two, article one, chapter fifty-nine of this code, the secretary of state shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service or acceptance,

as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, to such corporation at the address of its principal office, which address shall be stated in such process or notice. Such service or acceptance of such process or notice shall be sufficient if such return receipt shall be signed by an agent or employee of such corporation, or the registered or certified mail so sent by the secretary of state is refused by the addressee and the registered or certified mail is returned to the secretary of state, or to his office, showing thereon the stamp of the United States postal service that delivery thereof has been refused, and such return receipt or registered or certified mail is appended to the original process or notice and filed therewith in the clerk's office of the court from which such process or notice was issued. No process or notice shall be served on the secretary of state or accepted by him less than ten days before the return date thereof. The court may order such continuances as may be reasonable to afford each defendant opportunity to defend the action or proceedings.

For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this state pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this state, (b) if such corporation commits a tort, in whole or in part, in this state, or (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property

within this state notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this state at the time of said injury. The making of such contract, the committing of such tort or the manufacture or sale, offer of sale or supply of such defective product as hereinabove described shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the secretary of state pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract, tort, or manufacture or sale, offer of sale or supply of such defective product shall be of the same legal force and validity as process duly served on such corporation in this state.

APPENDIX H

West Virginia Code § 56-3-33:

Actions by or against nonresident persons having certain contracts [contacts] with this state; authorizing secretary of state to receive process; bond and fees; service of process; definitions; retroactive application.

(a) The engaging by a nonresident, or by his duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the secretary of state, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him, in any circuit court in this state, including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from or growing out of such act or acts, and the engaging in such act or acts shall be a signification of such nonresident's agreement that any such process against him, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this state:

(1) Transacting any business in this state;

(2) Contracting to supply services or things in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent

course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume or be affected by the goods in this state: Provided, That he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Having an interest in, using or possessing real property in this state; or

(7) Contracting to insure any person, property or risk located within this state at the time of contracting.

(b) When jurisdiction over a nonresident is based solely upon the provisions of this section, only a cause of action arising from or growing out of one or more of the acts specified in subdivisions (1) through (7), subsection (a) of this section may be asserted against him.

(c) At the time of filing a complaint and before a summons is issued thereon, the plaintiff, or someone for him, shall execute a bond in the sum of one hundred dollars before the clerk of the court, with surety to be approved by said clerk, conditioned that on failure of the plaintiff to prevail in the action or proceeding that he will reimburse the defendant, or cause him to be reimbursed, the necessary taxable costs incurred by him in and about the defense of the action or proceeding in this state, and upon the issuance of a summons, the clerk shall certify thereon that such bond has been given and approved. Service shall be made by leaving the

original and two copies of both the summons and the complaint with the certificate aforesaid of the clerk thereon, and the fee required by section two [s 59-1-2], article one, chapter fifty-nine of this code with the secretary of state, or in his office, and such service shall be sufficient upon such nonresident: Provided, That notice of such service and a copy of the summons and complaint shall forthwith be sent by registered or certified mail, return receipt requested, by the secretary of state to the defendant and the defendant's return receipt signed by himself or his duly authorized agent or the registered or certified mail so sent by the secretary of state which is refused by the addressee and which registered or certified mail is returned to the secretary of state, or to his office, showing thereon the stamp of the post-office department that delivery has been refused, shall be appended to the original summons and complaint and filed therewith in the clerk's office of the court from which process issued. If any defendant served with summons and complaint fails to appear and defend within thirty days of service, judgment by default may be rendered against him at any time thereafter. The court may order such continuances as may be reasonable to afford the defendant opportunity to defend the action or proceeding.

(d) The fee remitted to the secretary of state at the time of service shall be taxed in the costs of the action or proceeding and the secretary of state shall pay into the state treasury all funds so coming into his hands from such service. The secretary of state shall keep a record in his office of all such process and the day and hour of service thereof.

(e) The following words and phrases, when used in this section, shall for the purpose of this section and unless a different intent be apparent from the context, have the following meanings:

(1) "Duly authorized agent" means and includes among others a person who, at the direction of or with the knowledge or acquiescence of a nonresident, engages in such act or acts and includes among others a member of the family of such nonresident or a person who, at the residence, place of business or post office of such nonresident, usually receives and receipts for mail addressed to such nonresident.

(2) "Nonresident" means any person, other than voluntary unincorporated associations, who is not a resident of this state or a resident who has moved from this state subsequent to engaging in such act or acts, and among others includes a nonresident firm, partnership or corporation or a firm, partnership or corporation which has moved from this state subsequent to any of said such act or acts.

(3) "Nonresident plaintiff or plaintiffs" means a nonresident of this state who institutes an action or proceeding in a circuit court in this state having jurisdiction against a nonresident of this state pursuant to the provisions of this section.

(f) The provision for service of process herein is cumulative and nothing herein contained shall be construed as a bar to the plaintiff in any action or proceeding from having process in such action served in any other mode or manner provided by the law of this state or by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction.

(g) This section shall not be retroactive and the provisions hereof shall not be available to a plaintiff in a cause of action arising from or growing out of any of said acts occurring prior to the effective date of this section.